

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Docket No. 284 MD 2012

ROBINSON TOWNSHIP, Washington County, Pennsylvania, BRIAN COPPOLA, Individually and in his Official Capacity as SUPERVISOR of ROBINSON TOWNSHIP, TOWNSHIP OF NOCKAMIXON, Bucks County, Pennsylvania, TOWNSHIP OF SOUTH FAYETTE, Allegheny County, Pennsylvania, PETERS TOWNSHIP, Washington County, Pennsylvania, DAVID M. BALL, Individually and in his Official Capacity as COUNCILMAN of PETERS TOWNSHIP, TOWNSHIP OF CECIL, Washington County, Pennsylvania, MOUNT PLEASANT TOWNSHIP, Washington County, Pennsylvania, BOROUGH OF YARDLEY, Bucks County, Pennsylvania, DELAWARE RIVERKEEPER NETWORK, MAYA VAN ROSSUM, the Delaware Riverkeeper, MEHERNOSH KHAN, M.D.,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA PUBLIC UTILITY COMMISSION, ROBERT F. POWELSON, in his Official Capacity as CHAIRMAN of the PUBLIC UTILITY COMMISSION, OFFICE OF THE ATTORNEY GENERAL OF PENNSYLVANIA, LINDA L. KELLY, in her Official Capacity as ATTORNEY GENERAL of the COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MICHAEL L. KRANCER, in his Official Capacity as SECRETARY of the DEPARTMENT OF ENVIRONMENTAL PROTECTION

Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR REVIEW IN THE NATURE OF A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Nora Winkelman, Chief Counsel
Attorney I.D. No. 47181

David V. Vitale, Esquire
Attorney I.D. No. 90987

Sarah L. Clark, Esquire
Attorney I.D. No. 308126

Office of Chief Counsel
Democratic Caucus
Pennsylvania House of Representatives
Room 620 Main Capitol Building
Harrisburg, PA 17120-2248
(717) 787-3002

Date: May 14, 2012

Attorneys for Amici Curiae

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I. STATEMENT OF INTEREST OF AMICI CURIAE

The members of the Democratic Caucus of the Pennsylvania House of Representatives (hereinafter “House Democratic Caucus”) named below and on Attachment A attached hereto (collectively, “Amici Curiae”) file this brief in support of the position of Petitioners, Robinson, Peters, Cecil and Mount Pleasant Townships, Washington County, Pennsylvania; Brian Coppola, Supervisor of Robinson Township; David M. Ball, Councilman of Peters Township; the Township of Nockamixon, Bucks County, Pennsylvania; the Township of South Fayette, Allegheny County, Pennsylvania; the Borough of Yardley, Bucks County, Pennsylvania, the Delaware Riverkeeper Network; Maya Van Rossum, the Delaware Riverkeeper; and Doctor Mehernosh Khan, M.D. (“Petitioners”).

The House Democratic Caucus represents approximately 91 duly-elected members of the Pennsylvania General Assembly during the 2011-2012 Legislative Session. State Representative Frank Dermody is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 33rd Legislative District. Dermody was first elected to the Pennsylvania House of Representatives in 1990. In November, 2010, Dermody was elected by the members-elect of the House Democratic Caucus to serve as the Democratic Leader of the Pennsylvania House of Representatives for the 2011-2012 Legislative Session. Among other things, the duty of the Democratic Leader is to advocate for and represent the interests of the members of the House Democratic Caucus.

State Representative Michael K. Hanna is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 76th Legislative District.

Hanna was first elected to the Pennsylvania House of Representatives in 1990 and currently serves as House Democratic Caucus Whip.

State Representative Dan Frankel is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 23rd Legislative District. Frankel was first elected to the Pennsylvania House of Representatives in 1998 and currently serves as the House Democratic Caucus Chair.

State Representative Jennifer L. Mann is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 132nd Legislative District. Mann was first elected to the Pennsylvania House of Representatives in 1998 and currently serves as House Democratic Caucus Secretary.

State Representative P. Michael Sturla is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 96th Legislative District. Sturla was first elected to the Pennsylvania House of Representatives in 1990 and currently serves as House Democratic Caucus Policy Committee Chairman.

State Representative Ronald I. Buxton is a member of the Pennsylvania General Assembly as the duly-elected State Representative representing the 103rd Legislative District. Buxton was first elected to the Pennsylvania House of Representatives in 1992 and currently serves as House Democratic Caucus Administrator.

State Representative Joseph F. Markosek is a member of the Pennsylvania General Assembly as the duly-elected State Representative representing the 25th Legislative District. Markosek was first elected to the Pennsylvania House of Representatives in 1982 and currently serves as Democratic Chairman of the House Appropriations Committee.

State Representative Nick Kotik is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 45th Legislative District, which includes Petitioner South Fayette Township. Kotik was first elected to the Pennsylvania House of Representatives in 2002.

State Representative Steve Santarsiero is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 31st Legislative District, which includes Petitioner Yardley Borough. Santarsiero was first elected to the Pennsylvania House of Representatives in 2008.

State Representative Jesse White is a member of the Pennsylvania General Assembly and the duly-elected State Representative representing the 46th Legislative District, which includes Petitioner Robinson Township, Cecil Township and Mount Pleasant Township, Washington County, and parts of South Fayette Township in Allegheny County. White was first elected to the Pennsylvania House of Representatives in 2006.

As elected members of the House of Representatives, Amici Curiae, in accordance with the Pennsylvania Constitution Article VI, Section 3, have sworn to “support, obey and defend . . . the Constitution of this Commonwealth.” Amici Curiae strongly believe that Act 13 of 2012 (“Act 13”), specifically the provisions preempting local zoning prerogatives, violates Article I, Section 1 and Article III, Section 32 of the Pennsylvania Constitution. Consequently, Amici Curiae have a direct and substantial interest in the resolution of the constitutional issues raised by the Petitioners. Amici Curiae believes the Court would greatly benefit from their perspective and file this brief in support of the Petitioners.

II. STATEMENT OF JURISDICTION

Amici Curiae incorporate by reference the statement of jurisdiction set forth in Petitioners' Petition for Review on page 7.

III. STATEMENT OF THE CASE

Amici Curiae incorporate by reference the statement of facts set forth in Petitioners' Petition for Review on pages 17 through 27.

IV. SUMMARY OF ARGUMENT

The right to own property is a fundamental right protected by both the United States and Pennsylvania Constitutions. The Pennsylvania Supreme Court has explicitly recognized the rights of landowners in this regard: “[t]he right of landowners in this Commonwealth to use their property as they wish, unfettered by governmental influence except as necessary to protect the interests of the public and of neighboring property owners, is of ancient origin, recognized in the Magna Carta, and now memorialized in Article I, Section 1 of the Pennsylvania Constitution.” In re Realen Valley Forge Greenes Assoc., 838 A.2d 718, 727 (Pa. 2003). “That right, however, may be reasonably limited by zoning ordinances that are enacted by municipalities pursuant to their police power, i.e., governmental action taken to protect or preserve the public health, safety, morality, and welfare.” Id. The blanket zoning preemption provisions contained in Act 13 are an improper exercise of the Commonwealth’s police power as they are not designed to protect the health, safety, morals and public welfare of the citizens of Pennsylvania. As a result, Act 13 violates Article I, Section 1 of the Pennsylvania Constitution and the 14th Amendment to the United States Constitution.

Act 13 is also an unconstitutional “special law,” that creates a class of one industry with substantially more rights than any other industry, citizen or business in the Commonwealth in violation of Article III, Section 32 of the Pennsylvania Constitution. Article III, Section 32 was adopted to prevent the General Assembly from creating classifications to grant privileges to one person, one industry, or one locality. *See*, Article III, Section 32. “[I]t is clear a statute may be deemed *per se* unconstitutional if ... the class consists of one member and is closed or substantially closed to future membership.” Pa. Tpk. Comm’n v. Commonwealth, 587 Pa. 347, 369, 899 A.2d 1085, 1098 (2006). The closed class created by Act 13 is the oil and gas industry. Act 13’s zoning preemption affords the oil and gas industry the right to circumvent local zoning controls and regulatory procedures otherwise applicable to all other citizens, industries and businesses seeking to develop land in the Commonwealth. A citizen desiring to erect a shed in his back yard will jump through more hoops, and his plan will be subject to more scrutiny, than a natural gas production company will to locate a wastewater impoundment, which could contain chemicals known to be carcinogens, next to a home, school, playground or church. No other industry or business has the luxury of circumventing local zoning laws, and the Commonwealth cannot constitutionally justify such special treatment afforded the oil and gas industry by Act 13. By granting the oil and gas industry, alone, the power to bypass local zoning restrictions and locate well pads anywhere it pleases, Act 13 is in violation of Article III, Section 32 of the Pennsylvania Constitution.

Finally, Act 13 violates Article I, Sections 1 and 10 of the Pennsylvania Constitution by empowering the oil and gas industry to appropriate an interest in private property through the exercise of the Commonwealth’s eminent domain power. Under Pennsylvania law, the owner of

oil and gas rights has the implied right to use the surface estate to access and extract the natural resources. Consolidation Coal Co. v. White, 875 A.2d 318, 326 (Pa. Super., 2005). This precedent, in conjunction with Act 13's preemption of local zoning powers, effectively leaves surface owners with no property rights concerning oil and gas activities. Private property can only be taken to serve a public purpose, not for the benefit of another private property owner. Kelo v. City of New London, 545 U.S. 469 (2005). The sweeping preemption of local zoning controls in Act 13 cannot be justified on the basis of any public purpose. Therefore, Act 13 facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Section 10 of the Pennsylvania Constitution.

V. ARGUMENT

A. Act 13 is an unconstitutional exercise of the Commonwealth's police power.

Act 13's blanket local zoning preemption provision benefitting the oil and gas industry is an unconstitutional exercise of the Commonwealth's police power. Article I, Section 1 of the Pennsylvania Constitution guarantees individuals the ability to acquire, possess and protect property and to use that property as the individual sees fit. *See*, PA. CONST. Art. I, Sec. 1; *see also*, Appeal of Girsh, 437 Pa. 237, 241, 263 A.2d 395, 397, n. 3 (1970). The right of citizens to acquire, possess and protect property is a fundamental right.¹ Therefore, when enacting zoning

¹ The right to own property is recognized in international law and under the United States and Pennsylvania Constitutions. In international law, Article 17 of the Universal Declaration of Human Rights states that every person has the right to own property and that "no one shall be arbitrarily deprived of his property." UN General Assembly, Universal Declaration of Human Rights, 10 Dec. 1948, 217 A (17), at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html> (accessed 14 May 2012). The 14th Amendment to the United States Constitution prohibits any state from depriving any person of property without due process of law and Article I, Section 1. of the Pennsylvania Constitution states that "All men ... have certain inherent and indefeasible

regulations, all public authorities, including the Pennsylvania General Assembly, must exercise this police power in furtherance of the public health, safety, morals and general welfare of the particular community. *See, Exton Quarries, Inc. v. Zoning Bd. of Adjustment of West Whiteland Twp.*, 425 Pa. 43, 66, 228 A.2d 169, 182 (1967) (concurring opinion of Chief Justice Bell).

The police power to zone cannot be exercised in an unreasonable or arbitrary manner and must be based upon the unique facts and circumstances present in each community. In Village of Euclid, Ohio v. Ambler Realty, Co., 272 U.S. 365, 387 (1926), the United States Supreme Court recognized that universal, or statewide zoning is impractical and constitutionally impermissible, “[a] regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities.” *See also, Eller v. Bd. of Adjustment*, 414 Pa. 1, 198 A.2d 863 (1964). Act 13 takes great care to protect the financial health and welfare of the oil and gas industry but ignores the public health, safety, morals and general welfare of the citizens of the Commonwealth.

Act 13 essentially gives the oil and gas industry unfettered ability to drill in any zoning district, without oversight or regard for the existing local municipalities’ comprehensive plans, tax bases, need for orderly development or the desires and needs of the citizens of local communities. As such, Act 13 is not in the interest of the health, safety, morals, and public welfare of the Commonwealth and is, therefore, an unconstitutional exercise of the Commonwealth’s police power.

rights, among which are those of ... acquiring, possessing and protecting property....” U.S. Const. amend. XIV, Sec. 1; PA. CONST. Art. I, Sec. 1.

To make matters worse, the Commonwealth, in its Answer to the Petitioners' Motion for a Preliminary Injunction ("Answer"), has taken great liberties with the language of Act 13. The Commonwealth wrote that "Further guidance can be found through the Clean Water Act and other existing environmental laws which the Legislature made clear are to work concurrently with Act 13 so as to further the environmental goals of the Commonwealth." *See* 58 Pa.C.S. § 3257.² However, the Commonwealth either knew or should have known when it made this assertion to the Court that the natural gas industry is exempt from key provisions of many major federal environmental laws.³ Consequently, the Commonwealth's claim that existing

² Commonwealth Respondents' Answer to Petitioners' Motion for a Preliminary Injunction, Section II, D, 7, Page 25-26. (Attachment B).

³ Natural gas exploration and production processes are exempted from protections under the Clean Water Act, Safe Drinking Water Act (SDWA), National Environmental Policy Act (NEPA), Clean Air Act, Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under the Clean Water Act, it is illegal to discharge a pollutant into navigable waters of the United States without a permit. The revisions under the Energy Policy Act of 2005 exempted "water, gas, or other material which is injected into a well to facilitate production of oil or gas" from the definition of "pollutant." 33 U.S.C. § 1362. The Safe Drinking Water Act establishes minimum requirements for State underground injection programs to prevent drinking water contamination. 42 U.S.C. § 300h. The Energy Policy Act amended the SDWA to exempt hydraulic fracturing fluids from the definition of "underground injection." 42 U.S.C. § 300h(d). The Energy Policy Act also provided for a categorical exclusion from NEPA requirements for certain oil and gas activities conducted pursuant to the Mineral Leasing Act. 42 U.S.C. § 15942. The Clean Air Act requires the aggregation of smaller sources of emissions in order to determine pollution control requirements. However, the Act exempts oil and gas wells, as well as pipeline facilities, from aggregation, meaning that each site is considered an individual source of emissions and does not have to meet the more stringent emissions requirements for "major" sources. 42 U.S.C. § 7412. RCRA is a "cradle-to-grave" waste management program that requires disclosure and safe handling of hazardous waste. Although many materials in hydraulic fracturing fluid are individually considered "hazardous," the Act exempts oil and gas exploration and production wastes from the definition of "hazardous." 42 U.S.C. § 6921. CERCLA holds potentially responsible parties liable for clean-up costs resulting from a release or threatened release of a hazardous substance into the environment. The definition of hazardous substance under

environmental laws are to “work concurrently with Act 13” is disingenuous. The Commonwealth further attempts to prove that the Act was written to advance the interests of the public health, safety, morals, and general welfare by repeating the purported legislative intent of Act 13:

1. Permit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens.
2. Protect the safety of personnel and facilities employed in coal mining or exploration, development, storage and production of natural gas or oil.
3. Protect the safety and property rights of persons residing in areas where mining, exploration, development, storage or production occurs.
4. Protect the natural resources, environmental rights and values secured by the Constitution of Pennsylvania.

58 Pa.C.S. § 202. However, this language was already in existing law in the Oil and Gas Act that Act 13 replaced. The Commonwealth claims that Act 13 “is a comprehensive and broad reform”⁴ in the interest of the public, but many of the provisions found in Act 13 – including the legislative intent cited above - were already in law in the Oil and Gas Act.

More importantly, Act 13 does the *opposite* of protecting the property rights of persons residing in drilling areas. Under Pennsylvania law, the owner of oil and gas rights has the implied right to use the surface estate to access and extract the natural resources underlying the surface estate. Consolidation Coal Co. v. White, 875 A.2d 318, 326 (Pa. Super., 2005). This

CERCLA does not include natural gas, natural gas liquids, or otherwise hazardous substances found in crude oil and petroleum. 42 USC § 9601.

⁴ Commonwealth Respondent’s Answer to Petitioners’ Motion for Preliminary Injunction, Section I, Page 1. (Attachment B).

precedent, in conjunction with the provisions of Act 13, effectively leaves surface owners without *any* property rights in relation to oil and gas activities. Act 13 not only strips local governments' zoning powers, it also *mandates* that the Department of Environmental Protection grant setback variances to any well operator that applies. 58 Pa.C.S. § 3215(a). Therefore, even though Act 13 prohibits the location of a well bore within 500 feet of an existing building, it also grants an exemption to a well operator, who simply submits setback variance application paperwork to DEP.

Act 13's weak bonding requirements⁵ guarantee that taxpayers will be left holding the bag for abandoned well clean-up and reclamation for years to come. Pennsylvania's resident taxpayers are no strangers to footing the bill for the environmental cleanup resulting from outside corporations coming to the Commonwealth with promises of great wealth and leaving the environment in ruin. In fact, the citizens of the Commonwealth are still paying for the environmental damage left behind by the coal barons more than 100 years ago. Abandoned mine drainage continues to be Pennsylvania's single largest non-point source water pollutant, resulting in the impairment of more than 5,500 miles of Commonwealth streams and 350 acres of Commonwealth lakes.⁶ In addition to weak bonding requirements, Act 13 includes environmental buffers and setbacks that are completely inadequate to protect public water

⁵ A recent peer-reviewed study from Carnegie Mellon University found that the average cost of plugging a Marcellus well is \$100,000. Act 13 requires a \$10,000 bond per well, which creates a financial incentive to abandon the well without complying with reclamation requirements. Austin L. Mitchell & Elizabeth A. Casman, *Economic Incentives and Regulatory Framework for Shale Gas Well Site Reclamation in Pennsylvania*, *Envtl. Sci. & Tech.* (Oct. 10, 2011). (Attachment C).

⁶ PA Dep't of Env'tl. Prot., *2010 Pennsylvania Integrated Water Quality Monitoring Assessment Report* (2010). (Attachment D).

supplies, as well as private, family-owned water wells, from potential pollution and contamination. Furthermore, Act 13 requires the Department of Environmental Protection to grant a variance from distance restrictions from water wells, surface water intakes, reservoirs, and other water supply extraction points to any well operator that files an application for a variance. 58 Pa.C.S. § 3215(a). Therefore, the already inadequate environmental protections afforded in Act 13 effectively become null and void once a well operator applies for a variance.

B. Act 13 is a “special law” which creates unconstitutional distinctions between the oil and gas industry and other industries operating in the Commonwealth in violation of Article III, Section 32 of the Pennsylvania Constitution.

Article III, Section 32 became part of Pennsylvania’s Constitution in 1873 to prevent the General Assembly from creating classifications in order to grant privileges to one person, one company or one county. Wings Field Preservation Assoc., L.P. v. Com. Dept. of Trans., 776 A.2d 311, 316 (Pa. Commw. Ct. 2001). The evil of catering to an industry not in need of special protection was the catalyst for the Pennsylvanian equal protection constitutional amendment. Harrisburg School Dist. v. Hickok, 761 A.2d 1132, 1136 (Pa. 2000). The local zoning preemption provisions of Act 13 are precisely what the Constitution prohibits.

Act 13 is a “special law,” which creates an unconstitutional distinction between the oil and gas industry and every other industry operating in the Commonwealth in violation of Article III, Section 32 of the Pennsylvania Constitution, which provides:

The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law:

1. Regulating the affairs of counties, cities, townships, wards, boroughs, or schools districts,
- ...

7. Regulating labor, trade, mining or manufacturing.

...

Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

PA. CONST. Art. III, § 32. Under Act 13, the oil and gas industry is subject to virtually NO local scrutiny while every other industry operating in the Commonwealth is required to follow the existing zoning requirements in the municipality in which they are located. Any classification or distinction between groups made in the law must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. PA Turnpike Com’n v. Com., 899 A.2d 1085, 1094-1095 (Pa. 2006). The proponents of Act 13 have not provided any reasonable constitutional justification for the special classification made in Act 13 and the differing treatment between the oil and gas industry and all other industries. The oil and gas industry is a class of one with special rights not common to any other individual or industry.

Such special treatment for a select interest is the cornerstone of an unconstitutional “special law.” Historically, Pennsylvania has kept zoning decisions local. Local municipalities have been vested with the responsibility to use their “unique expertise ... to designate where different uses should be permitted in a manner that accounts for the community’s development objectives, its character, and the suitabilities and special nature of particular parts of the community.” Huntley & Huntley, Inc. v. Boro. Council of the Boro. of Oakmont, 600 Pa. 207, 225, 964 A.2d 855, 866 (2009) (internal quotations omitted). The zoning power may only be exercised to promote the health, safety, morals and welfare of the community and to protect individuals from the harmful effects of neighbors’ incompatible property uses. Therefore,

zoning districts are only found to pass constitutional scrutiny if each district only allows uses of land that are of the same character and are compatible with one another. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926); Hopewell Twp. Bd. of Supervisors v. Golla, 499 Pa. 246, 452 A.2d 1337, 1341-42 (1982). Act 13’s blanket, one-size-fits-all, local zoning preemption goes too far and allows for unconstitutional “spot zoning.” Unlike every other citizen, business or industry seeking to establish operations in a local municipality, the oil and gas industry is subject to special zoning standards under Act 13.

All other industrial uses are generally confined to industrial districts. However, under Act 13, oil and gas companies are permitted to locate the industrial use of oil and gas operations in any zoning district without any additional oversight or procedural constraints placed upon them. 58 Pa.C.S. § 3304(b)(5). Unlike ordinary citizens, who are limited in how they can develop parcels in residential districts, the oil and gas industry has been given special rights that are significantly greater than any other group of citizens. 58 Pa.C.S. § 3304. Take Petitioner South Fayette Township’s zoning ordinance, for example. Under the Township’s zoning ordinance, “private storage buildings,” or sheds, are a permitted accessory use in residential zoning districts. South Fayette Township, Pa., Code § 240 (2005). However, they are not permitted to be located in a front yard. Id. at § 240-99(C)(9). They are also subject to size restrictions and setback distances from any property line. Id. Act 13 requires local zoning ordinances to authorize impoundment areas as a permitted use in all zoning districts. 58 Pa.C.S. § 3304(b)(6) (emphasis added). They can be located anywhere within the township boundaries. Although Act 13 provides for a 300 foot setback distance from an existing building, Act 13’s preemption of all ordinances regulating the “same features” of oil and gas operations as are

contained in the Act prevent local municipalities from imposing additional, stricter requirements on wastewater impoundment areas. 58 Pa.C.S. § 3302. The oil and gas industry is the only industry that has been granted, to this degree, a special exemption to the standard rules for all to follow.

Additionally, landowners have an interest in the quiet use and enjoyment of their property near any proposed use, and a right to participate in the governing body's hearings. In re McGlynn, 974 A.2d 525 (Pa. Commw. Ct. 2009). Under Act 13, a local zoning board is mandated, regardless of the evidence, to approve oil and gas activities, turning zoning board hearings related to oil and gas into "kangaroo courts," because they are forced to turn a blind eye to any evidence brought forth by citizens, religious groups, community organizations and landowners. What's more, unlike any other industry, the oil and gas industry has been permitted to develop without regard for the local consideration of the health, safety, and general welfare of surrounding citizens and communities. No other citizen, business, or industry has been granted such "special treatment" to act without consideration of the health, safety and property rights of the citizens of the Commonwealth.

No valid constitutional justification has been proffered for exempting the oil and gas industry from local zoning procedures and appeal processes, which exist for the protection of the community. Plenty of citizens and other applicants would welcome a pass from municipal oversight, yet only the oil and gas industry has received such "special treatment."

Article III, Section 32 of the Pennsylvania Constitution has been interpreted to require that like persons in like circumstances are treated similarly. PA Turnpike Com'n v. Com., 899 A.2d 1085, 1094 (Pa. 2006). The General Assembly is prohibited from passing any "special

law” for the benefit of one group to the exclusion of others. *See, Lapacca v. Philadelphia Rapid Transit Co.*, 108 A. 612 (Pa. 1919). Any classification or distinction between groups made in the law must seek to promote a legitimate state interest or public value, and bear a “reasonable relationship” to the object of the classification. *PA Turnpike Com’n v. Com.*, 899 A.2d 1085, 1094-1095 (Pa. 2006). A classification may be deemed *per se* unconstitutional if the classified class consists of one type of member and is substantially closed to other members. *See, In re Williams*, 234 A.2d 37 (Pa. Super. 1967). The constitutional prohibition against special laws was adopted to put an end to privileged legislation enacted for private purposes. *Harrisburg School Dist. v. Hickok*, 761 A.2d 1132 (Pa. 2000).

During the movement of the legislation that became Act 13 through the legislative process, supporters touted (and continue to tout) the benefits of giving the oil and gas industry predictability and uniformity as it operates in various locales across the Commonwealth. However, the oil and gas industry is clearly not the only industry that operates statewide and must (absent Act 13’s provisions) comply with differing local regulations. Consider Pennsylvania’s manufacturing industry, for instance. “Heavy manufacturing,” which is defined in the South Fayette Township Zoning Ordinance as the manufacture of certain materials and products where processes involved will produce “noise, vibration, water pollution, fire hazard or noxious emissions that will disturb or endanger neighboring properties,” is not an authorized use in any zoning district in South Fayette Township. *South Fayette Township, Pa., Code §240 (2005)*. Therefore, a manufacturing business must submit a written application for approval of a use by special exception to the Zoning Officer. The Zoning Hearing Board will then hold a public hearing, in which the burden of persuasion is on the applicant to prove that the proposed

use “will not offend general public interest such as the health, safety and welfare of the neighborhood.” *Id.* at § 240-93(C)(4). If the Board approves the use, it may then prescribe conditions to safeguard the community. Under Act 13, zoning ordinances must authorize oil and gas operations in all zoning districts. 58 Pa.C.S. § 3304(b)(5) (emphasis added). Therefore, the oil and gas industry is not required to go through any approval processes or public hearings in order to locate a well anywhere in a municipality.

Additionally, Act 13 preempts any local ordinance that “imposes conditions, requirements or limitations on the same features of oil and gas operations” as are contained in the Act. 58 Pa.C.S. § 3302. Consequently, the local government has no power to require additional safeguards to protect the health, safety, and welfare of its citizens.

Unlike any other industry in Pennsylvania, the oil and gas industry is subject to NO local scrutiny under Act 13. Giving the oil and gas industry the right to bypass that which others must comply with as a regular incident of doing business is a “special” consideration and distinction that cannot be justified on any legitimate constitutional basis. Act 13 has unconstitutionally bestowed favor on one industry by providing it with special treatment not otherwise afforded to any other industries or citizen in the Commonwealth.

C. Under Act 13, the oil and gas industry is empowered to appropriate an interest in private property through the exercise of the Commonwealth’s eminent domain power in violation of the U.S. Constitution and Article I, Sections 1 and 10 of the Pennsylvania Constitution.

The United States and Pennsylvania Constitutions mandate that private property can only be taken to serve a public purpose. In re Opening Private Rd. for Benefit of O’Reilly, 5 A.3d 246 (Pa. 2010). Private property cannot be taken for the benefit of another private property

owner. Kelo v. City of New London, 545 U.S. 469 (2005). The Pennsylvania Supreme Court has maintained that to satisfy this obligation of serving a “public purpose,” the public must be the primary and paramount beneficiary of any taking. In re Opening Private Rd. for Benefit of O’Reilly, 5 A.3d 246, 258 (Pa. 2010). In considering whether a primary public purpose was properly invoked, the Pennsylvania Commonwealth Court has looked for the “real or fundamental purpose” behind a taking. In re Opening a Private Rd. for Benefit of O’Reilly Over Lands of (a) Hickory on Green Homeowners Ass’n & (b) Mary Lou Sorbara, WL 1709846 (Pa. Commw. Ct. 2011) (on remand from the Pennsylvania Supreme Court) (Attachment E). Stated otherwise, the true purpose must primarily benefit the public. Id.

Act 13 states: “... a corporation empowered to transport, sell or store natural gas or manufactured gas in this Commonwealth may appropriate an interest in real property ...”. 58 Pa.C.S. § 3241. Act 13 authorizes the oil and gas industry to unconstitutionally exercise the power of eminent domain for a private purpose. The real and fundamental purpose of any taking under Act 13 is to eliminate any private interference with the oil and gas industry’s ability to increase its profits, while exploiting the natural resources of the Commonwealth. The companies engaged in oil and gas exploration and production are private companies, not creatures of the state. Any taking by these private corporations of private property is not for a public purpose.

By crafting a single set of statewide zoning rules applicable only to the oil and gas industry, the proponents of Act 13 may have provided the predictability and increased profitability sought by the oil and gas industry, but they did so by undermining the predictability afforded to the citizens of Pennsylvania. Act 13’s impact cannot be overstated and the practical negative effects of eminent domain authority in the hands of the oil and gas industry on families

and communities may be difficult to quantify, but over time, will potentially be devastating. Allowing drilling within 300 feet of residential zones will take away citizens' use and quiet enjoyment of their own property. Homes and property values will plummet. The stress of living near a drilling site on children and families will be severe. The environment and fresh water sources will be devastated. Entire neighborhoods will be transformed and destroyed. Citizens and local communities should be able to decide for themselves how best to use their property and regulate drilling activities for the health and welfare of their families and residents. Act 13 elevates the interests of multinational oil and gas companies at the expense of property rights of the citizens of Pennsylvania.

The question that must be asked is: What public purpose is being served by the appropriation of an interest in real property by a corporation for the storage of natural gas? If such is deemed a "public purpose," by extension, this eminent domain power will extend to corporations' rights to acquire real property for the placement of above-ground storage of natural gas. Such a finding flies directly in the face of an individual's constitutional right to quiet use and enjoyment of his property. In limited circumstances, the Commonwealth may exercise its police powers to infringe upon an individual's property rights, but only in instances necessary to preserve the public health, safety, morals, or general welfare of its citizens. It cannot be justified on the basis of any paramount public purpose and it harms the public health, safety, morals, or general welfare of citizens of the Commonwealth. Act 13 facilitates an unconstitutional taking of private property for a private purpose in violation of Article I, Sections 1 and 10 of the Pennsylvania Constitution.

VI. CONCLUSION

Accordingly, for the foregoing reasons, Amici Curiae respectfully request that this Court grant Petitioners' request for a declaration that Act 13 is unconstitutional and for a permanent injunction against its implementation.

Respectfully submitted,



Nora Winkelman, Chief Counsel
Attorney I.D. No. 47181

David V. Vitale, Counsel
Attorney I.D. No. 90987

Sarah L. Clark, Counsel
Attorney I.D. No. 308126

Attorneys for Amici Curiae
Pennsylvania House of Representatives
Democratic Caucus
Office of Chief Counsel
Room 620 Main Capitol Building
Harrisburg, PA 17120-2248
(717) 787-3002

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ATTACHMENT A

Additional House Democratic Caucus Members

Representative Matthew Bradford, 70th Legislative District
Representative Tim Briggs, 149th Legislative District
Representative Michelle Brownlee, 195th Legislative District
Representative Michael Carroll, 118th Legislative District
Representative Scott Conklin, 77th Legislative District
Representative Dom Costa, 21st Legislative District
Representative Peter Daley, 49th Legislative District
Representative Margo Davidson, 164th Legislative District
Representative Madeleine Dean, 153rd Legislative District
Representative Anthony DeLuca, 32nd Legislative District
Representative Florindo “Flo” Fabrizio, 2nd Legislative District
Representative Robert Freeman, 136th Legislative District
Representative Camille “Bud” George, 74th Legislative District
Representative Neal Goodman, 123rd Legislative District
Representative William Kortz, 38th Legislative District
Representative Deberah Kula, 52nd Legislative District
Representative Gerald Mullery, 119th Legislative District
Representative Michael O’Brien, 175th Legislative District
Representative Eddie Day Pashinski, 121st Legislative District
Representative Rosita Youngblood, 198th Legislative District